Labor and Employment Law

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I. INTRODUCTION

This Article surveys revisions to the Official Code of Georgia Annotated (O.C.G.A.) and decisions interpreting Georgia law from June 1, 2014 to May 31, 2015[1] that affect labor and employment relations for Georgia employers.[2]

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1. For an analysis of Georgia labor and employement law during the prior survey period, see W. Melvin Haas III et al., *Labor and Employment Law, Annual Survey of Georgia Law*, 66 MERCER L. REV. 121 (2014).

2. Attorneys practicing labor and employment law have a multitude of reference sources for recent developments in federal legislation and case law. *See generally* THE

II. RECENT LEGISLATION: HALEIGH'S HOPE ACT AND MEDICAL MARIJUANA IN GEORGIA

Effective April 16, 2015, individuals with certain serious medical conditions may legally use medical marijuana to treat those illnesses. Governor Nathan Deal signed "Haleigh's Hope Act" into law, making Georgia the thirty-sixth state (in addition to the District of Columbia) to legalize the use of medical marijuana in various forms.[3] Georgia has limited the use of medical marijuana to "low THC oil" by people with certain medical conditions—for example, cancer, multiple sclerosis, Amyotrophic lateral sclerosis (ALS), Parkinson's, sickle cell disease, seizures, and glaucoma.[4] While the law does not allow for the cultivation of marijuana or cannabis oil in Georgia, it does permit registered individuals to obtain it legally elsewhere, and possess and use it in Georgia without fear of prosecution from the state.[5] From the new bill, the Georgia Department of Public Health must implement a registry for qualifying individuals and distributing authorization cards.[6]

The Georgia Legislature specifically included language in the bill that is pertinent to employers:

> (f) Nothing in this article shall require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in any form, or to affect the ability of an employer to have a written zero tolerance policy prohibiting the on-duty, and off-duty, use of marijuana, or prohibiting any employee from having a detectable amount of marijuana in such employee's system while at work.[7]

DEVELOPING LABOR LAW (John E. Higgins Jr. et al. eds., 6th ed. 2012 & Supp. 2014); BARBRA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW (Julia Campins et al. eds., 5th ed. 2012 & Supp. 2014); Patrick L. Coyle et al., *Labor and Employment, Eleventh Circuit Survey*, 64 MERCER L. REV. 865 (2013); *Daily Labor Report*, BNA.COM, http://www.bna.com/daily_labor_report-p5449 (last visited Sept. 30, 2014). Accordingly, this Article is not intended to cover the latest developments in federal labor and employment law. Rather, this Article is intended only to cover legislative and judicial developments arising under Georgia state law during the survey period.

3. Sarah Phaff, *Employer's Corner: Medical Marijuana Law Could Create Legal Issues for Employers*, MACON TEL. (May 26, 2015), http://www.macon.com/2015/05/26/3766227_medical-marijuana-law-could-create.html?rh=1#storylink=cpy.

4. Ga. H.R. Bill 1, Reg. Sess. (2015).

5. *Id.*

6. *Id.* § 1-2.

7. *Id.*

This section emphasizes that the law does not require employers to change any of their policies regarding drug use in the workplace.[8] This deference to employers includes the ability for employers to maintain a zero tolerance policy for their employees.[9] Georgia's employer-friendly provision shows that the representatives understand that "[e]mployers have a duty to their employees, customers, and the general public, to provide a safe and drug-free workplace."[10] For now, this provision also means that the law does not require employers to make reasonable accommodations under the Americans with Disabilities Act (ADA),[11] or otherwise, for those in the registry.[12] However, this scenario will likely be an area of case law that will be developed in the near future.

From the few cases decided on this issue around the United States,[13] the prevailing argument seems to be that as long as marijuana is illegal under federal law, employers will not have to accommodate for it, and it can be considered a cause for termination. In *Coats v. Dish Network*,[14] the Colorado Supreme Court decided that "lawful activities" only refer to those activities that are lawful under both state and federal law.[15] The court in *Coats* found that since the Controlled Substances Act (CSA)[16] prohibits the use of medical marijuana under federal law,[17] and federal law supersedes any state law, then the use of marijuana, even for medical purposes, is not a lawful activity.[18] Therefore, in *Coats*, the plaintiff was barred from bringing a wrongful discharge claim after his employer terminated him for failing a drug test.[19]

The United States Court of Appeals for the Ninth Circuit in *James v. City of Costa Mesa*[20] addressed whether there can be "discrimination"

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8. *See id.*

9. *Id.*

10. *See* Brief of Amici Curiae Pacific Legal Foundation and National Federation of Independent Business at *17, Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. 2010) (No. S056265), 2009 WL 5704681, at *17.

11. 42 U.S.C. §§ 12101-12213 (2012).

12. Ga. H.R. Bill 1.

13. *See generally* James v. City of Costa Mesa, 700 F.3d 394 (9th Cir. 2012); Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015).

14. 350 P.3d 849 (Colo. 2015).

15. *Id.* at 852-53.

16. 21 U.S.C. §§ 801-971 (2012).

17. 21 U.S.C. § 844(a) (2012).

18. *See* Gonzales v. Raich, 545 U.S. 1, 14 (2005).

19. 350 P.3d at 849, 850, 851.

20. 700 F.3d 394 (9th Cir. 2012).

against individuals who use medical marijuana.[21] In this case, the municipality sought to shut down medical marijuana dispensaries, and the plaintiffs filed suit, claiming discrimination against the availability of public services.[22] The court of appeals found that discrimination under the ADA does not apply to "an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use."[23] Further, the court held that the CSA still prohibits using medical marijuana in any form, and without any explicit or implicit changes to the CSA or ADA by Congress, medical marijuana does not fall within any exception under the ADA.[24] While this case is not specifically within the employment law realm, it does forecast the possible link, or lack thereof, between medical marijuana and the ADA.

III. WRONGFUL TERMINATION

A. At-Will Employment

Under "at-will employment," an employer or employee may terminate the employee's job at any time with or without cause by either of them.[25] While the status of at-will employment in other jurisdictions may be weakening,[26] the presumption in Georgia remains that all employment is at will unless a statutory or contractual exception exists.[27] "[T]his bar to wrongful discharge claims in the at will employment context 'is a fundamental statutory rule governing employer-employee relations in Georgia.'"[28] Particularly, O.C.G.A. § 34-7-1[29] provides that "an indefinite hiring" is at-will employment.[30] The definition of an indefinite hiring includes contractual provisions specifying "permanent employment, employment for life, [and] employ-

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21. *Id.* at 397.
22. *Id.* at 396.
23. *Id.* at 397 (quoting 42 U.S.C. § 12210(a) (2012)).
24. *Id.* at 401.
25. BLACK'S LAW DICTIONARY 641 (10th ed. 2014).
26. Haas et al., *supra* note 1, at 124 & n.25 ("[T]he employment at will doctrine is weakening in many jurisdictions." (alteration in original) (quoting W. Melvin Haas III et al., *Labor & Employment Law, Annual Survey of Georgia Law*, 61 MERCER L. REV. 213, 216 (2009))).
27. *See, e.g.*, Wilson v. City of Sardis, 264 Ga. App. 178, 179, 590 S.E.2d 875, 877 (2003).
28. Reid v. City of Albany, 276 Ga. App. 171, 172, 622 S.E.2d 875, 877 (2005) (quoting Reilly v. Alcan Aluminum Corp., 272 Ga. 279, 280, 528 S.E.2d 238, 240 (2000)); *see also* O.C.G.A. § 34-7-1 (2008).
29. O.C.G.A. § 34-7-1 (2008).
30. *Id.*

ment until retirement."[31] Further, a contract specifying an annual salary does not create a definite period of employment.[32] However, if an employment contract does not specify a definite period of employment, any employment beyond the contractual period becomes employment at will that is subject to discharge without cause.[33]

Regardless of an employer's motives, the general rule in Georgia allows for the discharge of an at-will employee without creating "a cause of action for wrongful termination."[34] Moreover, oral promises between an employer and employee will not modify the relationship between the two because absent a written contract, an employee's status remains at will.[35]

B. Whistleblower Act

Under the Georgia Whistleblower Act,[36] "[n]o public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency . . . ."[37] To make out a prima facie case, the plaintiff must prove four elements: "(1) he was employed by a public employer; (2) he made a protected disclosure or objection; (3) he suffered an adverse employment action; and (4) there is some causal relationship between the protected activity and the adverse employment action."[38]

In *Albers v. Georgia Board of Regents of the University System of Georgia*,[39] the court held that a protected whistleblowing activity only requires the plaintiff to have a reasonable belief that his objection or disclosure was in relation to a violation of the law, not that it was actually a violation of the law.[40] Additionally, the court held that the

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31. Ga. Power Co. v. Busbin, 242 Ga. 612, 613, 250 S.E.2d 442, 443 (1978) (internal quotation marks omitted).

32. Ikemiya v. Shibamoto Am., Inc., 213 Ga. App. 271, 273, 444 S.E.2d 351, 353 (1994).

33. Schuck v. Blue Cross & Blue Shield of Ga., Inc., 244 Ga. App. 147, 148, 534 S.E.2d 533, 534 (2000).

34. H&R Block E. Enters., Inc. v. Morris, 606 F.3d 1285, 1294 (11th Cir. 2010) (quoting Nida v. Echols, 31 F. Supp. 2d 1358, 1376 (N.D. Ga. 1998)); Fink v. Dodd, 286 Ga. App. 363, 365, 649 S.E.2d 359, 362 (2007) ("The employer[] with or without cause and regardless of its motives may discharge the employee without liability.") (alteration in original).

35. Balmer v. Elan Corp., 278 Ga. 227, 228-29, 599 S.E.2d 158, 161 (2004).

36. Ga. H.R. Bill 642, Reg. Sess., 2012 Ga. Laws 446 (codified at O.C.G.A § 45-1-4 (Supp. 2015)); *see also* Colon v. Fulton Cnty., 294 Ga. 93, 93, 751 S.E.2d 307, 308 (2013).

37. O.C.G.A § 45-1-4(d)(2).

38. Albers v. Ga. Bd. of Regents of the Univ. Sys. of Ga., 330 Ga. App. 58, 61, 766 S.E.2d 520, 523 (2014), *cert. applied for*; *see also* Forrester v. Ga. Dep't of Human Servs., 308 Ga. App. 716, 722, 708 S.E.2d 660, 666 (2011).

39. 330 Ga. App. 58, 766 S.E.2d 520 (2014), *cert. applied for.*

40. *Id.* at 62, 766 S.E.2d at 523.

statute of limitations only begins to run when an actual adverse employment action is taken against the employee.[41] Christopher Albers was the chief of police at Georgia Perimeter College (GPC) until he was given written notice of his termination on November 19, 2009. Albers alleged retaliation, claiming that he was engaged in a protected activity when he refused a request from the administration to speak to the district attorney about dropping or reducing charges against a student involved in a theft. GPC Human Resources began their own investigation of the incident and, according to Albers, interfered with the criminal investigation. Subsequently, the relationship between the police department and the administration deteriorated.[42]

On June 25, 2009, human resources advised Albers to either resign or face termination. He initially agreed to resign. However, Albers changed his mind and refused to sign. On November 19, 2009, he was terminated for "unsatisfactory job performance."[43] The Georgia Court of Appeals held that Albers had successfully presented a prima facie case for whistleblower retaliation and that there were questions of fact as to the reason for termination and the causation element.[44] The court also pointed out that the claim was not barred from the one year statute of limitations because the limitations period only begins when there is "a definitive decision to take adverse action against" the employee, rather than a "threatened termination."[45]

IV. NEGLIGENT HIRING OR RETENTION

Under O.C.G.A § 34-7-20,[46] "[t]he employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency."[47] The Georgia Court of Appeals held that this statute imposes a duty on the employer to "warn other employees of dangers incident to employment that 'the employer knows or ought to know but which are unknown to the employee.'"[48] To sustain an action for negligent hiring, the plaintiff must prove the employer hired an employee whom "the employer knew or should have known posed a risk of harm to others where it [was] reasonably foreseeable from the

41. *Id.* at 65, 766 S.E.2d at 525.
42. *Id.* at 58, 59-60, 766 S.E.2d at 521-22.
43. *Id.* at 60-61, 766 S.E.2d at 522.
44. *Id.* at 62-63, 766 S.E.2d at 523-24.
45. *Id.* at 65, 766 S.E.2d at 525.
46. O.C.G.A § 34-7-20 (2008).
47. *Id.*
48. Tecumseh Prods. Co. v. Rigdon, 250 Ga. App. 739, 740, 552 S.E.2d 910, 912 (2001) (quoting O.C.G.A § 34-7-20).

employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff."[49] Typically, "the determination of whether an employer used ordinary care in hiring an employee is a jury issue,"[50] and is only a question of law "where the evidence is plain, palpable and undisputable."[51]

In *Allen v. Zion Baptist Church of Braselton*, [52] the court of appeals reversed the grant of summary judgment.[53] The court concluded that there were genuine issues of material fact on each element namely, negligent hiring, retention, and supervision.[54] In this case, Zion Baptist Church allowed a volunteer to interact with the church youth group without first doing a complete investigation into his background and references. The volunteer took a child into the woods across from the church and molested him. The parents of the child subsequently brought a claim against the church for negligent hiring, retention, and supervision.[55] First, the court determined that there was a question of fact on whether the attack was "wholly unrelated" to the circumstances of the employment as a volunteer because the man met the victim at a church event and the attack happened across the street from the church.[56] Second, there was a question of material fact on whether the church exercised ordinary care in hiring the volunteer because they failed to check the references of the volunteer before allowing him to work with children unsupervised.[57]

In *Graham v. City of Duluth*,[58] the Georgia Court of Appeals held that summary judgment was not appropriate where there were genuine issues of material fact on the pre-employment investigation and the failure to follow the set procedures for the police department.[59] Matthew Dailey applied for employment with the City of Duluth's Police Department, but the department did not consider him for an open position until a year later. Between the time of his initial application

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49. Munroe v. Univ. Health Servs., Inc., 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004) (internal quotation marks omitted).

50. *Tecumseh*, 250 Ga. App. at 741, 552 S.E.2d at 912.

51. *Munroe*, 277 Ga. at 864, 596 S.E.2d at 607 (quoting Robinson v. Kroger Co., 268 Ga. 735, 739, 493 S.E.2d 403, 408 (1977)).

52. 328 Ga. App. 208, 761 S.E.2d 605, 607 (2014), *cert. denied*, 2015 Ga. LEXIS 60 (2015).

53. *Id.* at 208-09, 761 S.E.2d at 607.

54. *Id.*

55. *Id.* at 210-11, 761 S.E.2d at 608-09.

56. *Id.* at 213, 761 S.E.2d at 610.

57. *Id.* at 215, 761 S.E.2d at 611.

58. 328 Ga. App. 496, 759 S.E.2d 645 (2014), *reconsideration denied* (July 23, 2014), *cert. denied*, 2015 Ga. LEXIS 32 (2015).

59. *Id.* at 503, 759 S.E.2d at 651.

and his hiring, Dailey was arrested and involuntarily committed to the hospital for drunkenly wielding his service weapon at his neighbors. The police department was not aware of this incident when they hired Dailey. Some years later, Dailey assaulted a civilian.[60] The court held that while the city was not liable under respondeat superior for Dailey's actions because he was not acting in furtherance of his employer's business, there was a question for the jury on whether it was "reasonably foreseeable from the employee's tendencies or propensities that the employee could cause the type of harm sustained by the plaintiff."[61] The department set forth procedures requiring an update to the application before the "new hire" status was given, and if the department had updated the application, then they might have found the incident involving Dailey drunkenly brandishing his weapon to his neighbors.[62]

Likewise, in *Hardison v. Enterprise Rent-A-Car*,[63] the court of appeals reversed the trial court's grant of summary judgment for the negligent retention claim because it determined that the management previously received multiple reports of the employee's questionable behavior.[64] Marshall Hardison and Tarsha Tarver were drivers at Enterprise. While they were transferring cars, there was an incident where Tarver verbally and physically assaulted Hardison. Following the incident, Enterprise terminated both employees. According to testimony by management and co-workers, Tarver displayed this behavior at Enterprise in the past, but the employer never formally reprimanded him. Among other claims, Hardison brought a claim for negligent retention.[65] On appeal, the court found that there was enough evidence to create a factual dispute on whether "Enterprise knew or should have known of Tarver's propensity to commit the violent act of which he complains."[66]

V. RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, an employer may be held vicariously liable for the negligence or intentional torts of employees that are committed within the scope of their employment.[67] To hold an

60. *Id.* at 498, 500, 759 S.E.2d at 648, 649.

61. *Id.* at 505, 759 S.E.2d at 652-53 (quoting *Munroe*, 277 Ga. at 863, 596 S.E.2d at 606) (internal quotation marks omitted).

62. *Id.* at 503, 504, 759 S.E.2d at 651, 652.

63. 331 Ga. App. 705, 771 S.E.2d 402 (2015).

64. *Id.* at 708, 771 S.E.2d at 403.

65. *Id.* at 706, 771 S.E.2d at 402.

66. *Id.* at 707, 771 S.E.2d at 403.

67. CHARLES R. ADAMS III, GEORGIA LAW OF TORTS § 7:2 (2015-2016 ed.).

employer vicariously liable for the torts of an employee, the following two elements must be established: (1) the employee was acting in furtherance of the employer's business; and (2) the employee was acting within the scope of the employer's business.[68]

A. *Scope of Employment*

In *Ambling Management Co., LLC v. Miller*,[69] the Georgia Supreme Court affirmed the decision of the court of appeals to overturn the summary judgment order from the trial court.[70] In this case, an off-duty police officer, who worked security for an apartment complex, shot a visitor to the apartment complex when he suspected the visitor was involved in a drug transaction. The visitor filed suit, claiming a multitude of torts, including battery, assault, and false imprisonment.[71] The court reasoned that summary judgment for Ambling (the apartment complex) was not proper because there were questions of material fact concerning the scope of employment of the officer *"at the time the causes of action arose."*[72] That is, the time period to focus on in determining who should be held liable for the officer's actions, the apartment complex or police department, is when the tort arose.[73]

In this survey period, the court of appeals decided three respondeat superior cases in which the employee was driving a company vehicle when the accident occurred. In all of these cases, the court held that the employees were not acting within the scope of their employment, and thus, the employers were not liable for the employee's actions.[74] In cases where the employee is driving the employer's vehicle, there is "a presumption . . . that the employee was acting in the course and scope of his employment at the time of the collision."[75] Therefore, the burden is on the employer to show evidence to the contrary, and if it does, then the burden shifts back to the plaintiff to present "uncontradicted evidence" that the employee was acting within the scope of his employ-

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68. *Id.*

69. 295 Ga. 758, 764 S.E.2d 127 (2014).

70. *Id.* at 759, 764 S.E.2d at 128.

71. *Id.* at 758, 760-61, 764 S.E.2d at 128, 129-30.

72. *Id.* at 764-65, 764 S.E.2d at 132 (emphasis in original).

73. *Id.* at 763, 764 S.E.2d at 131.

74. *See generally* Archer Forestry, LLC v. Dolatowski, 331 Ga. App. 676, 771 S.E.2d 378 (2015); Mastec N. Am., Inc. v. Sandford, 330 Ga. App. 250, 765 S.E.2d 420 (2014), *reconsideration denied* (Dec. 8, 2014), *cert. denied*, 2015 Ga. LEXIS 160 (2015); CGL Facility Mgmt., LLC v. Wiley, 328 Ga. App. 727, 760 S.E.2d 251 (2014), *reconsideration denied* (July 31, 2014), *cert. denied*, 2014 Ga. LEXIS 861 (2014).

75. *Archer Forestry, LLC*, 331 Ga. App. at 679, 771 S.E.2d at 380 (quoting *Sandford*, 330 Ga. App. at 254, 765 S.E.2d at 424).

ment.[76] It is commonly held that an employee's commute to and from work is not within the scope of his employment.[77]

In *Archer Forestry v. Dolatowski*,[78] the employee was traveling home in the company vehicle when he caused an accident with the plaintiff.[79] Here, the court held that since the employee was clearly on his way home from work, and the plaintiff offered no evidence to show otherwise, the employer could not be held liable for the employee's actions.[80] In *CGL Facility Management, LLC v. Wiley*,[81] the court concluded the same when an employee, driving a company vehicle on his way into work, swerved over the centerline and killed the driver of the other car.[82] Lastly, in *Mastec North America, Inc. v. Sandford*,[83] the court held that since the employee was driving the company van home after work when the accident occurred, he was not in the scope of employment at the time of the injury.[84] The plaintiff attempted to show that the employee was still in the scope of employment because he had not finished the paperwork from his last job, but the company policy clearly stated that driving home was not working time, even if the paperwork was incomplete.[85]

B. Borrowed Servant

A commonly recognized exception to respondeat superior is the borrowed servant rule.[86] This rule relieves an employer from liability when they have lent their employee to another employer.[87] To constitute a borrowed servant, the relationship must meet each of the following: "(1) the special master had complete control and direction of the servant for the occasion; (2) the general master has no such control[;] and (3) the special master had the exclusive right to discharge the

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76. *Id.*

77. *Id.* at 679, 771 S.E.2d at 381.

78. 331 Ga. App. 676, 771 S.E.2d 378 (2015).

79. *Id.* at 679, 771 S.E.2d at 381.

80. *Id.* at 680, 771 S.E.2d at 381.

81. 328 Ga. App. 727, 760 S.E.2d 251 (2014), *reconsideration denied* (July 31, 2014), *cert. denied*, 2014 Ga. LEXIS 861 (2014).

82. *Id.* at 727, 760 S.E.2d at 253.

83. 330 Ga. App. 250, 765 S.E.2d 420 (2014), *reconsideration denied* (Dec. 8, 2014), *cert. denied*, 2015 Ga. LEXIS 160 (2015).

84. *Id.* at 256-57, 765 S.E.2d at 425.

85. *Id.* at 255-56, 765 S.E.2d at 424-25.

86. Garden City v. Herrera, 329 Ga. App. 756, 758, 766 S.E.2d 150, 152 (2014), *cert. denied*, 2015 Ga. LEXIS 109 (2015).

87. *Id.* at 758, 766 S.E.2d at 152.

servant."[88] When evaluating each of these prongs, courts have indicated that the time to focus on is when the "injury occurred" for the "specific task for which the servants are loaned."[89]

In *Garden City v. Herrera*,[90] the court of appeals reversed the trial court's denial of summary judgment and held that an officer in a multijurisdictional taskforce met each prong of the borrowed servant test.[91] Garden City and Chatham County entered into an agreement to form a multijurisdictional drug unit, which allowed the City to assign a police officer to the unit. While an officer was a member of that unit, he would remain a city employee and the city's police chief had the authority to remove him, but the commanding officer of the unit had "exclusive directive supervision and authority" over the officer. Judd Robert West, the officer assigned to the unit by the City, had a car accident while driving from one operation's location to another pursuant to an order given by the unit's commanding officer.[92] The court held that the third prong of the borrowed servant test, whether there is an exclusive right to discharge the servant, was satisfied.[93] The court reasoned that, when properly focusing only on the specific task for which the master loaned the servant, the commanding officer was the only person who had the right to discharge the officer from the activity when the accident occurred.[94]

VI. RESTRICTIVE COVENANTS

In 2011, the law in Georgia on restrictive covenants underwent major changes when the voters approved a constitutional amendment.[95] Prior to the amendment, courts only allowed non-compete agreements when they placed a partial restraint solely on trade, rather than a general restraint.[96] As a result, any covenant that placed a general restraint was void, and notwithstanding a severability clause, would void the entire agreement.[97] Under the amendment, courts focus their analysis

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88. *Id.* at 758-59, 766 S.E.2d at 152 (alteration in original) (quoting Six Flags Over Ga., Inc. v. Hill, 247 Ga. 375, 377, 276 S.E.2d 572, 574 (1981)).

89. *Id.* at 759, 766 S.E.2d at 152-53 (emphasis omitted) (quoting Fulghum Indus. v. Pollard Lumber Co., 106 Ga. App. 49, 52, 126 S.E.2d 432, 435 (1962)).

90. 329 Ga. App. 756, 766 S.E.2d 150 (2014), *cert. denied*, 2015 Ga. LEXIS 109 (2015).

91. *Id.* at 756-57, 761, 766 S.E.2d at 151, 154.

92. *Id.* at 757, 766 S.E.2d at 151-52.

93. *Id.* at 761, 766 S.E.2d at 154.

94. *Id.*

95. *See* GA. CONST. art. III, § 6, para. 5(c)(3).

96. *See* O.C.G.A § 13-8-2(a) (2010 & Supp. 2015).

97. Vulcan Steel Structures, Inc. v. McCarty, 329 Ga. App. 220, 224, 764 S.E.2d 458, 462 (2014).

on whether a covenant reasonably restricts future employment.[98] The amendment also allows the courts to blue pencil agreements made after 2011 to avoid invalidating the entire agreement.[99] However, agreements made before the approval of the amendment are not subject to blue penciling.[100] These prior agreements will be held valid as a partial restraint on trade only when the agreement is specific and reasonable in regard to duration, territorial coverage, and scope of the prohibited activities. [101]

In *Vulcan Steel Structures, Inc. v. McCarty*,[102] the court of appeals overturned the holding in *Covington v. D.L. Pimper Group*[103] to the extent that a non-solicitation clause could prevent a former employer from communicating with unsolicited customers.[104] In 2008, Gary John McCarty entered into a covenant with Vulcan Steel Structures to not solicit customers for two years. He went to work for Vulcan's competitor, and unsolicited customers interested in working with him and his new employer contacted him.[105] The court held that this was unreasonable and, therefore, a clause preventing the acceptance of business from unsolicited clients was void.[106] Since this agreement was made before the 2011 amendment, the entire agreement was, in turn, void.[107]

Conversely, in *Fab'rik Boutique, Inc. v. Shops Around Lenox, Inc.*,[108] the court of appeals upheld a radius restriction because it was reasonable in duration, territorial coverage, and scope of activity.[109] In 2009, Fab'rik Boutique, Inc. (Fab'rik) and Shops Around Lenox, Inc. (Shops Around Lenox) entered into a lease agreement, which contained a restrictive covenant that Fab'rik could not open up another Fab'rik store

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98. GA. CONST. art. III, § 6, para. 5(c)(3); *see also* O.C.G.A § 13-8-50 (2010 & Supp. 2015). For a more in-depth legislative and political history of the restrictive covenant constitutional amendment, *see* Haas et al., *supra* note 1, at 132-33.

99. *Vulcan Steel Structures, Inc.*, 329 Ga. App. at 220, 764 S.E.2d at 459.

100. *See, e.g.*, Lapolla Indus. Inc. v. Hess, 325 Ga. App. 256, 265-66, 750 S.E.2d 467, 475-76 (2013); Cox v. Altus Healthcare & Hospice, Inc., 308 Ga. App. 28, 30-31, 706 S.E.2d 660, 663-64 (2011).

101. *Cox*, 308 Ga. App. at 31, 706 S.E.2d at 664; *see also* W.R. Grace & Co., Dearborn Div. v. Mouyal, 262 Ga. 464, 465, 422 S.E.2d 529, 531 (1992).

102. 329 Ga. App. 220, 764 S.E.2d 458 (2014).

103. 248 Ga. App. 265, 546 S.E.2d 37 (2001), *overruled by* Vulcan Steel Structures, Inc. v. McCarty, 329 Ga. App. 220, 764 S.E.2d 458 (2014).

104. *Vulcan Steel Structures, Inc.*, 329 Ga. App. at 224, 764 S.E.2d at 461-62.

105. *Id.* at 220-21, 222, 764 S.E.2d at 459, 460.

106. *Id.* at 222, 764 S.E.2d at 460.

107. *Id.* at 220, 764 S.E.2d at 459.

108. 329 Ga. App. 21, 763 S.E.2d 492 (2014), *cert. denied*, 2014 Ga. LEXIS 994 (2014).

109. *Id.* at 25, 763 S.E.2d at 496.

within five miles. Fab'rik opened up two stores within the prohibited radius, and Shops Around Lenox informed them that they had defaulted on their lease.[110] Fab'rik argued that the "radius restriction was invalid because it was overly broad."[111] However, the court reasoned that since the restriction was limited to Fab'rik stores with specific qualities, like those that sell only women's clothing and accessories, it was not overly broad.[112]

In *Early v. MiMedx Group, Inc.*,[113] the Georgia Court of Appeals was presented with the question of whether a full-working-time provision in a nondisclosure agreement was enforceable against the consultant.[114] This full-working-time provision required Ryanne Early, a consultant for MiMedx Group, to "devote her full working time" to the company's services.[115] The court interpreted this provision to apply to all working time, whether or not that working time was related in any way to MiMedx's business.[116] The court held that this condition was not merely a loyalty provision; it was a restraint of trade because it prohibited her from doing any other work, not just work that would compete with the company.[117]

In *Holland Insurance Group, LLC v. Senior Life Insurance Co.*,[118] the court determined the restrictive covenants between Senior Life Insurance Company (Senior Life) and their independent agent, William Holland, had several issues.[119] Senior Life terminated Holland because it believed he violated the restrictive covenants in the agreement when he allegedly induced a policyholder to substantially change their policy with Senior Life.[120] The court found that the nondisclosure agreement did not contain a time limit; therefore, it was unenforceable unless the information was considered a trade secret.[121] The information in question for this case was the customer lists of potential clients.[122] In deciding this issue, the court pointed out that typically, unless the information cannot be obtained anywhere else, customer lists

110. *Id.* at 21-22, 763 S.E.2d at 493.
111. *Id.* at 22, 763 S.E.2d at 494.
112. *Id.* at 21, 763 S.E.2d at 493.
113. 330 Ga. App. 652, 768 S.E.2d 823 (2015), *cert. denied*, 2015 Ga. LEXIS 327 (2015).
114. *Id.* at 652-53, 768 S.E.2d at 824-25.
115. *Id.* at 653, 768 S.E.2d at 825.
116. *Id.* at 658, 768 S.E.2d at 828.
117. *Id.* at 659, 768 S.E.2d at 828.
118. 329 Ga. App. 834, 766 S.E.2d 187 (2014).
119. *Id.* at 835, 766 S.E.2d at 190.
120. *Id.* at 836-37, 766 S.E.2d at 191.
121. *Id.* at 838, 766 S.E.2d at 192.
122. *Id.* at 835, 766 S.E.2d at 190.

are not considered trade secrets.[123] However, because there was evidence to support Senior Life's contention that those lists were unobtainable elsewhere, the court wanted to leave it up to a jury to decide.[124] The court also held that the non-compete clause was unenforceable because it prohibited Holland from taking business that was unsolicited; hence, it was deemed overly broad.[125] While these covenants were not subject to the blue-penciling like the post-2011 amendments, the covenants contained a severability clause, so the whole contract was not void.[126]

In *Advanced Technology Services v. KM Docs, LLC*,[127] the court held that Advanced Technology Services, Inc. (ATS) presented no evidence that KM Docs, LLC (KM Docs) used trade secrets or confidential information in developing a new software program.[128] In 2010, two former employees left ATS and created KM Docs. Under this new company, the former employees created a bridge program for a document management system. One employee, in relation to his employment with ATS, signed a trade secret agreement stating that all software developed by ATS employees was a trade secret that was confidential and owned by ATS.[129] However, the court held that there was no breach of the agreement because software created outside of the scope of employment did not fall within the agreement, and the employee created the program on his own time and with his own equipment.[130] Therefore, without any corroborating evidence to show that the employee misappropriated ATS's code or software in some way, the court affirmed the trial court's decision to grant summary judgment in favor of KM Docs.[131]

VII. CONCLUSION

As this Article demonstrates, the issues arising under Georgia law are progressively becoming more challenging each year, and the growing overlap between state and federal issues, as well as the expanding state regulations, adds to the challenge. Regardless of whether a practitioner specializes in state, federal, or administrative law, or other matters pertaining to labor and employment, it is important to recognize and

123. *Id.* at 838-39, 766 S.E.2d at 192.
124. *Id.* at 839, 766 S.E.2d at 192-93.
125. *Id.* at 840, 766 S.E.2d at 193.
126. *Id.* at 841, 766 S.E.2d at 193.
127. 330 Ga. App. 188, 767 S.E.2d 821 (2014), *reconsideration denied* (Dec. 4, 2014).
128. *Id.* at 192, 196, 767 S.E.2d at 825, 828.
129. *Id.* at 189, 190, 767 S.E.2d at 824.
130. *Id.* at 195-96, 767 S.E.2d at 828.
131. *Id.* at 196, 767 S.E.2d at 828.

stay abreast of the ever-evolving trends, policies, cases, and state and federal guidelines.